No. 10759

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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CHIQUITA MINING COMPANY, LTD.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REHEARING.

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TOPICAL INDEX.

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To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Petitioner, Chiquita Mining Company, Ltd., respectfully petitions this Court for a rehearing of the above-entitled cause, and bases its petition upon each and all of the following grounds:

1. Petitioner has not had the benefit of this Court's analysis and determination of the precise contentions urged by petitioner, *and as urged by petitioner*, for a reversal of the decision of The Tax Court of the United States.

2. This Honorable Court has inadvertently overlooked certain most essential phases of the evidence and the record.

3. This Court has adopted respondent's statement of the questions involved for decision, instead of those raised by petitioner, which has misled this Court into basing its decision upon an incomplete factual basis.

4. In holding that petitioner was precluded by the "best evidence rule" from introducing certain oral and documentary evidence, this Court has entirely failed to consider and pass upon the effect of the undisputed evidence in the record showing a waiver by respondent of the best evidence rule, and the consent by respondent to the introduction of secondary evidence without laying any further foundation therefor.

5. Petitioner in its motion to reopen the cause for the presentation of further evidence upon the issue of the allowance of a proper rate for depletion of the ores in the properties owned by petitioner based its motion squarely upon undisputed evidence of the illness of its counsel, which was the direct *cause* of the failure to produce the evidence to which The Tax Court restricted the proof. Petitioner has not had the benefit of this Court's decision as to whether the affidavits relied upon were deemed by it to be true or false, and if true, whether the facts therein recited constituted a sufficient reason for reopening the cause so that it could be determined on the merits rather than upon a procedural technicality.

We shall argue the grounds above set forth in the order in which they appear.

I.

Petitioner Has Not Had the Benefit of This Court's Analysis and Determination of the Precise Contentions Urged by Petitioner, and as Urged by Petitioner, for a Reversal of the Decision of the Tax Court of the United States.

We should perhaps begin the argument under this point with an apology, since it may appear that we are launching into an academic discourse on the manner in which this Court, or any appellate court, should render its decisions. We do feel, however, that the failure of this Court to set forth and answer the precise contentions of petitioner, *exactly as raised by petitioner,* has caused the Court to arrive at an incorrect and unjust conclusion.

The opinion sets forth the contentions of respondent and shows certain reasons why it holds respondent's contentions to be sound. Each of those reasons which are set forth were reasons advanced by respondent and based upon its own incomplete statement of the factual situation. The opinion does not, however, answer the criticisms advanced by petitioner, which, if given due consideration, would demonstrate the unsoundness of respondent's position.

From our experience in appellate court matters, we have observed that written opinions take one of three methods of procedure, or a combination of two or all of them.

An appellate court can take the individual contentions made by an appellant or petitioner, and it can demonstrate wherein such specific contentions are sound or unsound.

A second method consists of the court's taking the contentions of respondent, which it proceeds to adopt or reject.

The third course is to ignore the contentions of appellant and those of respondent, and to decide the case upon the court's own interpretation of the facts and the legal principles to be applied thereto.

We conscientiously believe that an appellant is entitled to a direct answer on his appeal with reference to the precise questions that are raised by him. If the court decides against him, he is particularly entitled to the court's opinion setting forth the reasons why *his* contentions are unsound. Consequently, the first course of procedure mentioned above will enable the appellant to be heard fully and his case determined by a direct decision upon each of the contentions urged by him.

We do not mean that the contentions of the respondent should be ignored in the process. On the contrary, the contentions of respondent can be utilized by the court as a means of ascertaining and revealing the flaws, if any, in the contentions of appellant.

But the second method of determining questions on appeal, which consists of the court's taking the contentions of respondent, which it proceeds to adopt or reject, in most instances has little worth. Its effect could be accomplished by a decision without opinion, with the mere statement that the contentions of respondent are correct.

The third manner of arriving at a decision, that is by the court setting forth its own statement of material facts and applicable legal principles, should be indulged in only when both appellant and respondent have entirely failed to appreciate the correct condition of the record and have

overlooked the true legal principle or principles which are determinative of the rights and obligations of the parties.

With all due respect to the Court, we feel that in its opinion the Court has not given us a direct answer to the exact questions which were raised by us in arguing certain most important contentions contained in our briefs. On the contrary, the Court has adopted respondent's theories, which entirely evade and avoid the major premises upon which petitioner's contentions are grounded.

In setting forth the above ground, we do not intend to be hypercritical of the Court's opinion. We do feel, however, that an appellant is entitled to have a decision directly upon the contentions urged by him. It is his appeal. He is either right or wrong. If he is wrong, he is entitled not only to be told so, but also to be shown wherein he is wrong.

The affirmation of respondent's position, standing alone, rarely gives a specific answer to the precise questions raised by an appellant. We sincerely believe that if the first procedure referred to by us above is followed, a decision in favor of petitioner will result.

II.

This Honorable Court Has Inadvertently Overlooked Certain Most Essential Phrases of the Evidence and the Record.

In our argument under subsequent points we shall argue certain individual points in detail, to which we shall refer only generally under this point.

Petitioner contended squarely in both its briefs and in oral argument that the record showed that there was an express waiver by counsel for respondent during the hearing before The Tax Court of the rule which obligated petitioner to produce and introduce primary evidence. This Honorable Court has evidently overlooked the express stipulation, waiver and consent by counsel for respondent, since nowhere in its opinion is any mention made of the effect thereof.

In determining whether The Tax Court had properly denied petitioner's motion for a further hearing, no mention is made of the undisputed evidence of the illness of counsel for petitioner. On the contrary, a reading of the opinion, particularly certain footnotes in which only a portion of one affidavit is set forth, leads one to feel that the Court proceeded upon the theory that the failure to produce the evidence to which the proof was restricted was caused by neglect which was inexcusable.

As we shall later show, this inadvertent failure to consider the most essential premises of the questions raised by petitioner has naturally resulted in a different result from that which would have resulted if all the facts were given due and full consideration.

III.

This Court Has Adopted Respondent's Statement of the Questions Involved for Decision, Instead of Those Raised by Petitioner, Which Has Misled This Court Into Basing Its Decision Upon an Incomplete Factual Basis.

On pages 9 and 10 of our opening brief, as our third specification of error we set forth the following individual contentions that The Tax Court had committed prejudicial error:

> "Counsel for the Commissioner *having agreed to the introduction of secondary evidence* in lieu of certain written documents, the Court erred:
>
> "(a) In restricting the proof to such written documents;
>
> "(b) In rejecting the secondary evidence of the attorney for petitioner, concerning the consideration for said mining properties paid by petitioner, and that *portion* of said consideration which was received by the vendors, Jack H. Smith and Otto F. Schwartz, upon the question as to whether said vendors were at any time thereafter in as much control of petitioner's affairs as they had been prior to the acquisition of said properties by petitioner;
>
> "(c) In rejecting the secondary evidence of Mark J. Sandrich, C. P. A., on the same subject;
>
> "(d) In rejecting the books and records of petitioner in the possession of said Mark J. Sandrich, C. P. A., on the same subject."

It will be observed that each of those contentions is predicated directly upon the premise that counsel for respondent had agreed to the introduction of secondary evidence in lieu of certain written documents which petitioner did not produce.

On pages 18 to 21 of our brief, we again repeated the statement of this contention and set forth at length the portion of the printed record which clearly supported our claim of an express consent to the introduction of secondary evidence.

On pages 2 and 3 of his brief, respondent has rephrased the statement of our contentions, and it will be noted that respondent has carefully avoided any reference whatsoever to his waiver of the right to object to secondary evidence.

On pages 5 to 7 of its opinion, this Court has apparently adopted respondent's phrasing of appellant's alleged contentions; and by doing so, has inadvertently omitted any reference in its decision to the existence and effect of the express waiver by counsel for respondent of the right to object to the introduction of the various kinds of evidence offered by petitioner, and specifically argued under specification of error No. 3.

IV.

In Holding That Petitioner Was Precluded by the "Best Evidence Rule" From Introducing Certain Oral and Documentary Evidence, This Court Has Entirely Failed to Consider and Pass Upon the Effect of the Undisputed Evidence in the Record Showing a Waiver by Respondent of the Best Evidence Rule, and the Consent by Respondent to the Introduction of Secondary Evidence Without Laying Any Further Foundation Therefor.

We have already demonstrated under the preceding point that this Court has been misled by respondent's phrasing of the contentions which petitioner is supposed to be urging on this review, into predicating its opinion upon an incomplete statement of facts. To us the erroneous conclusion drawn therefrom is self-evident.

As we read the Court's opinion, each type of evidence proffered by petitioner and rejected by The Tax Court was secondary evidence. This Court held that it was therefore properly excluded. Everything, however, which the Court sets forth to justify the rulings of The Tax Court would have to be reversed if due consideration were given to the express consent by counsel for respondent to the introduction of secondary evidence. There is no hard and fast rule that secondary evidence is always inadmissible. It is universally held that the benefits of the best evidence rule can be waived. We contended that there had been such a waiver in the instant case by express stipulation by counsel for respondent in open court. We respectfully request a decision on this point.

In arguing the questions concerning secondary evidence, we do not wish to be understood as conceding that the books and records which Sandrich, the C. P. A., set up for the corporation, were not proper books and records kept in the ordinary course of business by the corporation, and admissible under the best evidence rule. There is no evidence in this record that these books and records set up for the corporation by Mr. Sandrich were set up by him for the purpose of meeting this tax situation. The evidence, on the contrary, shows that they were in existence long before these proceedings were initiated. That they are correct would definitely and conclusively seem to appear from the fact that petitioner has paid its taxes to the government based upon those records, and the government has been unable to find any error therein. In short, the only objection that has been made, with the expenditure of over a million dollars, is that petitioner adopted an incorrect rate of depreciation and an improper rate of depreciation. As to the former The Tax Court held that petitioner was justified in adopting the rate of depreciation used by it. With reference to the latter, petitioner has adopted as its basis a theory twice previously adopted, ratified and confirmed by the Bureau of Internal Revenue.

We have purposely not raised the question of former rulings of the Bureau of Internal Revenue in this petition for rehearing; but if used for no other purpose, those prior decisions indicate that the present theory of petitioner has reasonable justification.

V.

Petitioner in Its Motion to Reopen the Cause for the Presentation of Further Evidence Upon the Issue of the Allowance of a Proper Rate for Depletion of the Ores in the Properties Owned by Petitioner Based Its Motion Squarely Upon Undisputed Evidence of the Illness of Its Counsel, Which Was the Direct Cause of the Failure to Produce the Evidence to Which the Tax Court Restricted the Proof. Petitioner Has Not Had the Benefit of This Court's Decision as to Whether the Affidavits Relied Upon Were Deemed by It to Be True or False, and if True, Whether the Facts Therein Recited Constituted a Sufficient Reason for Reopening the Cause so That It Could Be Determined on the Merits Rather Than Upon a Procedural Technicality.

This Court has disposed of the contention on the part of petitioner that The Tax Court abused its discretion in denying petitioner's motion for a further hearing by a repetition of its holding that certain evidence was available to petitioner and should have been presented in the original hearing. Once again, the Court is dealing with an effect and not the cause for that effect. In our contentions with reference to the claim that The Tax Court erred in rejecting certain types of evidence, we were concerned with certain *effects* existing during the trial. These effects related to the failure to produce the evidence which The Tax Court held should have been produced. In petitioner's motion for a further hearing, the reasons were set

forth why that evidence was not produced. Those reasons constituted the *cause*. This was an entirely new question which was not presented during the trial. We sincerely feel that we were entitled to the benefit of this Court's determination whether that cause was a sufficient cause. The opinion summarily disposes of the question with the following language:

> "The petitioner is not entitled to a rehearing to remedy the mistakes of counsel since the taxpayer has had his day in court. Counsel in this case were neither unauthorized nor incompetent."

The language of the Court deals with this entire question as if the failure to produce the evidence in question resulted solely from a mistake on the part of counsel for petitioner. No mention is made of the illness conclusively proved by the affidavits filed in support of petitioner's motion, and against which no contradictory proof was offered by respondent. We feel that we have not had our day in court. It is our firm belief that a just decision on the merits should not be sacrificed to the rigidity of technical rules of procedure. Rules of procedure are adopted to promote justice, not to defeat it. Ours is the realistic point of view.

It has been said that more and more the circuit courts of appeal have become the supreme court for about ninety-nine per cent of litigants in the federal system. The realistic attitude towards litigants is that which regards substance rather than form, and which holds that a thing which is morally wrong cannot be legally right.

Conclusion.

We trust that this Court will pardon our approach to the questions presented by us on this petition for rehearing. We have tried to consider the various phases of the several questions from a practical viewpoint. It will be noted that in this petition we have refrained from a repetition of citations and quotations which are contained in our briefs. However, we respectfully call this Court's attention to those citations, particularly in the light of what we have said above.

We earnestly contend that substantial justice will not be done unless a rehearing is granted, and that the United States of America, as represented by respondent, should not be unjustly enriched by the collection of a tax which a hearing on the merits would disclose should not be collected.

Respectfully submitted,

A. P. G. Steffes,
Attorney for Petitioner.

Certificate of Counsel.

The undersigned counsel of record hereby certifies that the foregoing petition is well founded and is not interposed for the purpose of delay.

A. P. G. Steffes,
Attorney for Petitioner.